No. 22,415

IN THE

United States Court of Appeals

For the Ninth Circuit

IRVIN RAPOPORT,
Appellant,

vs.

ROSE RAPOPORT, also known as JOAN SIROTT,
Appellee.

Appeal from the United States District Court for the District of Nevada

APPELLANT'S REPLY BRIEF

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Subject Index

Table of Authorities Cited

Cases

Constitutions

Rules

Texts

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Careful and unhurried reflection on the posture adopted in appellee's Brief convinces appellant that its (to him) singular character is attributable to two major factors:

1. An unyielding refusal to make any remarks whatsoever about unfavorable facts, no matter how fundamental they might be; coupled with an equally steady avoidance of reference to cases and principles of law (already cited) which have a similar effect on the appellee's position. Appellant submits that this silence speaks far more loudly for him than the most inspired rhetoric.

2. A recital of principles of law, selected by quotation from cited cases, accurate *in the main* as to the validity of the principles themselves, but either (a) Mere dicta in the cited cases; (b) Mere dicta when applied to facts in the case at bar; or (c) Applied, specifically or by necessary inference, to the Nevada decree when, under the facts of the cases involved, they should apply instead to the Pennsylvania decree. (In much the same way that a reversible coat is turned inside out.)

So uniform is this mode of handling the factual and legal materials involved that appellant is obliged to resort to a point-by-point reply; to follow by pointing out the omissions; and conclude by commenting briefly on the choice of alternatives presented to the Learned Court by the facts and the arguments of the parties.

I. REBUTTAL TO APPELLEE'S STATEMENT OF THE CASE: SHE FORGETS THE PRIOR PENDING PENNSYLVANIA DIVORCE ACTION.

Appellee's very first sentence begs the entire question by assuming the answer to one of the most basic problems to be decided by the Court;—stating flatly that she had fulfilled the domiciliary requirements of Nevada before commencing her Nevada proceedings. It would seem superfluous for the Court to consider the case at all if

this question were thus foreclosed: but we recall from the actual Record that she herself alleged she was a Pennsylvania resident and domiciliary (X 1, RT 6, CT 265); never claimed change of residence, even in Nevada, until May 7, 1964 (X 3, RT 7, CT 29); had commenced a Pennsylvania divorce action on December 19, 1963 (X 1, RT 6, CT 263) which she was actively pursuing on May 1, 1964 (X 1, RT 6, CT 301); and that *appellant had averred she was a Pennsylvania domiciliary on May 20, 1964* (X 2, RT 6, CT 194-196) in a Complaint in Equity *to which she never filed a denial* (X 2, RT 6).

Similarly, the permanent injunction secured by appellant was, precisely, *not* ex parte, as she claims. Appellee was already subject to the jurisdiction of the Pennsylvania court by reason of her domicile and her voluntary choice of it as the forum for her divorce action, and the injunction arose out of this very subject-matter.[1] See Opening Brief, pp. 16-23.

Appellant concedes that he asserted no "defenses" in the Nevada action: everyone agrees he was never personally served and did not appear, either specially or by counsel. It is thus the Nevada decree that, without dispute, is the one that was entered ex parte.

Appellee did indeed go through a marriage ceremony with Sirott on the very day she received her Nevada decree, but he was no "Nevada businessman", a Pennsylvania court having already found him on June 24, 1964 to be a Pennsylvania domiciliary (see *Sirott v. Sirott,*[2] Appellant's Opening Brief, pp. 45-47); a conclusion to which he failed to press on appeal.

What strikes appellant as most extraordinary about this Statement is that nowhere in this recital of "facts"

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[1] *James v. Grand Trunk Western R. Co.,* 14 Ill.(2d)356, 152 NE (2d) 858 (1958); *Dorney v. Dorney,* 245 F(2d) 201 (4 Cir. 1957); *Rothman v. Rothman,* 424 Pa. 406, 228 A(2d) 899 (1967); Restatement, *Conflict of Laws,* §77(1)(e) pp. 114, 115.

[2] 85 Montg L R 228 (Pa. 1965).

is there the slightest reference to those facts *completely uncontradicted in the Record and admitted by appellee in her own testimony under oath (RT 12) that she was still actively engaged in a prior Pennsylvania divorce action instituted by her, when she went to Nevada to get a divorce on the advice of her Pennsylvania attorney* (RT 12).

II. SINCE EVERY CASE CITED BY APPELLEE DEMONSTRATES THAT SHE WAS BARRED FROM RELITIGATING, IN NEVADA, PENNSYLVANIA'S FINDING OF JURISDICTION, APPELLANT'S "OBLIGATION TO DEFEND" WAS NIL.

The first question in this appeal is *not,* as appellee asserts (p. 4) whether the court below was "clearly erroneous" in finding as a fact "that (appellant) did not sustain the burden of proof of overcoming the presumption of appellee's 'domicile' established by the Nevada decree": it is the last. In fact, *since she was personally subject to Pennsylvania's jurisdiction, appellee* must overcome that very presumption regarding jurisdiction with respect to the Pennsylvania decree of Permanent Injunction of June 24, 1964 (twelve days earlier);[3] and appellant has pointed out repeatedly that since she offered no proof—in fact, did not even plead the offer—to overcome that presumption, the subsequent finding by Pennsylvania concerning her domicile and jurisdiction became res judicata, and thereby barred the Nevada court from making any finding of its own choice on jurisdiction.[4]

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[3] *Williams v. North Carolina,* 325 U.S. 226, 233-4, 65 S.Ct. 1092, 1097 (1945); *Stoll v. Gottlieb,* 305 U.S. 165, 171, 172, 59 S.Ct. 134 (1938); *Cook v. Cook,* 342 U.S. 126, 128, 72 S.Ct. 157 (1951).

[4] *Sutton v. Leib,* 342 U.S. 402, 72 S.Ct. 398 (1952); *Sherrer v. Sherrer,* 334 U.S. 343, 68 S.Ct. 1094 (1948); *Treinies v. Sunshine Mining Co.,* 308 U.S. 66, 76-78, 60 S.Ct. 44 (1939).

Thus, it follows inexorably that the citations of the *Rice, Esenwein,* and *Williams*[5] cases (all correctly stated as to principle, at least) apply to *place that burden of proof on appellee,* not on him; and her persistent effort to place the cart before the horse—the Nevada decree *before* the Pennsylvania decree—is, therefore, devoid of legal merit.

We are asked how appellant can possibly explain his wife's assumption of Nevada domicile "shortly after" July 6, when she was not a domiciliary shortly before. The answer is the essence of simplicity: she intended to marry Sirott immediately upon securing her divorce, and *thereafter* live with him wherever he chose. He chose, *bona fide* or otherwise, to claim Nevada as his legal residence, and this residence accordingly became hers at that time. *If he had chosen to live in Alaska, she would never have become a Nevada resident.*

Appellant is no more impressed than was the Pennsylvania court which issued the Permanent Injunction that the letters, fully described in his Opening Brief (p. 42), all postmarked from New Jersey during the ostensible six-week period of her physical presence in Nevada, written by appellee in her own hand and claiming a Pennsylvania return address on two of them, constituted "flimsy" evidence: and three of them (X 15-17) were obviously introduced into evidence in Pennsylvania, *since the Exhibits themselves show on their faces "P-3", "P-4", and "P-5", clearly not the designations of the court below.* Since their only materiality would be on the question of appellee's domicile during this period, two baseless claims advanced by appellee are destroyed at the same time: (1) there *was* a hearing in Pennsylvania to secure the

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[5]*Rice v. Rice,* 336 U.S. 674, 69 S.Ct. 751 (1949); *Esenwein v. Pennsylvania,* 325 U.S. 279, 65 S.Ct. 1118 (1945); *Williams v. North Carolina (#1),* 317 U.S. 287, 63 S.Ct. 207 (1942); *Williams v. North Carolina (#2), supra.*

permanent injunction, at which testimony was taken; and (2) that testimony covered appellee's domicile, an issue which the court decided against her.

There is, accordingly, no basis for appellee's assertions to the contrary (pp. 18, 19) concerning a hearing which her counsel did not attend, but at which appellant and his counsel were definitely present.[6]

Appellant has never claimed that if appellee were legally a Nevada domiciliary on June 24, 1964, the Nevada court would be "precluded from exercising jurisdiction over her divorce" (p. 8): he categorically argues that Pennsylvania found on that date that she was a Pennsylvania domiciliary, subject to its jurisdiction, and that Nevada was accordingly barred, by *res judicata,* from relitigating that issue.[7] She had appeared before Pennsylvania on the same subject matter, she as well as appellant was still before the court, and the final decree so entered bound her personally.[8]

It is, therefore, not appellant, but she, who was duty bound to appeal the jurisdictional finding against her to the Pennsylvania appellate court or waive her objections to that holding; *and all* (except the *Williams* cases) *of the cases cited by appellee in her brief (p. 9) specifically so hold.*

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[6]If that hearing was a mere formality, why did that Court not also sign and file Findings of Fact and Conclusions of Law which appellant's counsel undoubtedly would have submitted for that purpose, as well as the Decree of Permanent Injunction? Moreover, that appellee's Pennsylvania counsel (who admittedly instructed appellee to evade Pennsylvania's already attached jurisdiction and secure a divorce elsewhere, and prepared her Brief) should dare to urge upon us that the veteran President Judge of a court of which he is an officer, was lying when he stated his Decree was entered *"after hearing"* (X 2, RT 6, CT 244)—*when counsel himself was not there*—appellant finds shockingly unprofessional.

[7]*Sutton v. Leib, supra,* and other cases cited this Brief, p. 4.

[8]*Sutton v. Leib, supra.*

Since in every one of them (except the *Williams* cases), *both parties were before the court* (the situation which here obtained only in Pennsylvania) it is the Pennsylvania defendant—appellee—who was foreclosed by failure to appeal the finding on jurisdiction. In Nevada, on the other hand, everyone grants that appellant was never before the court; and the law has always allowed the defendant against whom an ex parte decree has issued to attack its jurisdiction collaterally. *This is what the Williams cases hold.*[9] This is what appellant has done in the case at bar.

III. SINCE NEVADA'S FINDING OF JURISDICTION WAS BARRED BY RES JUDICATA, ITS SUBSEQUENT DECREE WAS VOID, AND THUS NOT ENTITLED TO FULL FAITH AND CREDIT.

Since appellee's Brief sometimes overlooks material facts in the cases she cites (where she gives them at all) appellant will attempt to rectify this deficiency.

In the *Morris*[10] case, plaintiff sued an Illinois corporation doing business in Missouri, in the latter state. Illinois appointed a statutory receiver for the defendant. *Plaintiff secured judgment in Missouri first,* and filed an exemplified copy of his judgment in Illinois, asking that it be accorded Full Faith and Credit there. It will be noted that both parties were before both courts. Illinois disallowed his claim, and after state appeal failed, he sought Federal relief.

The Supreme Court, with the author of the *Williams* majority opinions writing for the majority here, held that

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[9]See, to the same effect, *Sutton v. Leib, supra; Cook v. Cook, supra; Rice v. Rice, supra.*

[10]*Morris v. Jones,* 329 U.S. 545, 67 S.Ct. 451 (1947).

as to the matters involved in the Missouri suit, plaintiff's claim was good and entitled to Full Faith and Credit, reversed the Illinois judgment, and stated:

> "A judgment of a court having jurisdiction of the parties and subject matter operates as *res judicata,* in the absence of fraud or collusion, even if obtained upon a default . . . Such a judgment obtained in a sister state is . . . entitled to full faith and credit in another State though the underlying claim would not be enforced in the State of the forum." (pp. 550, 551)

It is of interest that Illinois made the same claim that appellee makes here: that it is the later Illinois decree which is really entitled to full faith and credit. Mr. Justice Douglas disposes of this contention as follows (at p. 552):

> "As to" (appellee's) "contention that the Illinois decree, of which petitioner had notice, should have been given full faith and credit by the Missouri court, only a word need be said. *Roche v. McDonald,* supra, pp. 454-455, makes plain that the place to raise that defense was in the Missouri proceedings. And see *Treinies v. Sunshine Mining Co.,* 308 U.S. 66, 77 . . . In any event, the Missouri judgment is res judicata as to the nature and amount of petitioner's claim as against all defenses which could have been raised." (Citing cases).

He then concludes (at p. 553):

> "The command is to give full faith and credit to every judgment of a sister state. . . . The function of the Full Faith and Credit Clause is to resolve controversies where state policies differ. Its need might not be so greatly felt in situations where there was no clash of interests between the States. . . . But the answer given by *Fauntleroy v. Lum"* (210 U.S. 230) "is conclusive. If full faith and credit is not given in that situation, the Clause" (fails where its) "need is the greatest."

In the *Southard*[11] case (first brought to the attention of the court below by appellant in support of its jurisdiction), H got an ex parte Nevada divorce, and W sued thereafter for divorce in Connecticut. *H appeared in Connecticut and set up his Nevada decree as a defense.* When that court found for W, *he did not appeal,* but applied for a declaratory judgment in Federal court, which dismissed his action. On appeal, the Court affirmed, stating (before the quotation to be found on page 11 of appellee's brief) (at p. 732):

> ". . . We . . . would affirm the order of dismissal because, as appellee now asserts, the complaint reveals facts which show that the action is barred by principles of *res judicata.* If we were to reverse the district court's order, it would be compelled on remand to grant appellee's inevitable motion under Rule 12(b) (6) of the Federal Rules of Civil Procedure to dismiss the action as *res judicata.* . . . It is clear from the appellant's complaint that—as he admits in his brief on this appeal—he entered an appearance in the Connecticut divorce action, the outcome of which he seeks here to attack. His person was thus under the jurisdiction of the Connecticut court, and there are no allegations which could support collateral attack on that judgment. Whether or not he subsequently defaulted as to the further proceedings leading up to the judgment, and whether or not he was deprived of rights by errors of the Connecticut court, our determination that the court had jurisdiction over him and the case precludes any further attack on the judgment. Morris v. Jones, 329 U.S. 545, 67 S. Ct. 451 (1947)."

It will be noted that the petitioner in the cited case occupies exactly the same legal position as the instant appellee.

Appellant not only finds no fault with Restatement of the Law, *Judgments,* § 42 cited by appellee; he is pleased

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[11] *Southard v. Southard,* 305 F(2d) 730 (2 Cir. 1962).

to observe that since it supports the *Southard* case, *supra,* it supports his position, not appellee's. Only appellee was before the Nevada court in the instant case, but both parties were before the Pennsylvania court; and accordingly her conclusion (p. 12) that "Rapoport's refusal to enter the judicial arena of Nevada to raise . . . res judicata . . . was legally fatal to him" is erroneous. On the contrary: as both *Southard* and Section 42 indicate, *it was legally fatal to appellee in Pennsylvania.*

Thus, while we may admire the vividness of appellee's peroration based on hypothetical facts[12] we must recognize that the conclusion she has so laboriously erected thereon is not only likewise hypothetical but (from a legal standpoint) sheer fantasy.

IV. A PROPERLY ENTERED FINAL JUDGMENT, VALID IN THE STATE OF ISSUANCE, IS ENTITLED TO THE SAME EFFECT ELSEWHERE AS IT WOULD RECEIVE WHERE ISSUED; AN INJUNCTION STANDS IN NO DIFFERENT POSITION THAN ANY OTHER JUDGMENT, AND CONFINEMENT OF ITS RECOGNITION TO CONSIDERATIONS OF "COMITY" IS NOT LAW.

The "in passing" section of appellee's brief will be examined after we note Restatement, *Conflict of Laws,* § 450(2):

> "§ 450 Effect of Valid Foreign Judgment . . . (2) The effect of a valid judgment as a conclusive adjudication between the parties and persons in privity with them of facts which were *or might have been put in issue* in the proceedings is determined by the law of the state where the judgment was rendered."

See, also Restatement, *Conflict of Laws,* § 451(2) pp. 160, 161 (1948 Supplement) which was specifically revised

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[12]Appellee's Brief, p. 14.

on the statement of res judicata and jurisdictional facts in the light of the *Davis, Stoll* and *Treinies* cases (*Sherrer v. Sherrer* and *Sutton v. Leib,* at that time, were still in the future).

Appellant has never claimed his injunction was directed *to the Nevada Court itself,* and will certainly not quarrel with the *results* reached in the *Wenz*[13] case. As an objective study in the dexterity with which appellee reviews cases, however, the use of the cited quotation from *Wenz* is notable. This language, mentioned by the court *without comment,* proceeds from the 1935 case of *Trees v. Glenn,* 319 Pa. 487, 181 A. 579, (in which it is dictum), which in turn has merely quoted it from Ruling Case Law, an even earlier authority. What the court in the *Wenz* case *really* concludes, however, is (at p. 400):

> "Until the litigation in Lehigh County" (Pennsylvania) "has been terminated, there can be no justification for a suit between the same parties, involving the same issue, and instituted subsequent to attachment of the jurisdiction of the court below, to be pending elsewhere."[14]

Appellee's quotation is therefore mere dictum.

The statement in the *Peters* case is also mere dictum: that suit involved an attempt to restrain an arbitration association from arbitrating a contract dispute, and was controlled by the finding that defendant was not a necessary party to the controversy under the contract.

However, appellee makes it clear that in her view, an injunction, in spite of Sections 429, 430 and 450(2)[15] *supra,* is *not* entitled to the same effect as all other judgments and decrees, by (apparently) its general nature.

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[13]400 Pa. 397, 162 A(2d) 376 (1960).

[14]For a full review of the *Wenz* facts, see Appellant's Opening Brief, pp. 21, 22.

[15]All from Restatement, *Conflict of Laws.*

Appellant takes flat issue with this position, and contends that (1) Where the injunction was issued by the court which first obtained jurisdiction over both of the parties and the subject matter; (2) that where it was the first *final* decree rendered on the subject matter at issue; (3) that where it issued after reasonable notice to the parties to be affected thereby and after hearing; (4) that where it related to a marital dispute in the marital domicile of the parties; and (5) where the party who was enjoined, herself submitted the subject matter to court for determination in the first instance: *that where all five of these factors are unchallengeably present* (as they are in the case at bar), *the Permanent Injunction issued is entitled to the protection of the Full Faith and Credit Clause like any other judgment of equal stature,* and not merely to the dubious allowances of comity.

He further urges that appellee's position is not supported by law on these facts; and that despite some language in distinguishable cases redolent of the "comity" test utilized in the overruled case of *Haddock v. Haddock,* 301 U.S. 562 (1906) (which was confined to the shelf of history by the first *Williams* case in 1942) *there has not been a single American case discoverable by him, on these facts, which has so held.*

In *James v. Grand Trunk Western R. Co., supra,* cited by both appellant and appellee (although for different propositions) plaintiff, a Michigan citizen, commenced a purely transitory action in Illinois, in which defendant appeared. Defendant, however, secured a Michigan injunction against her to prevent the prosecution of the prior Illinois action. Plaintiff applied for and, finally, obtained, a counter-injunction from the Illinois Supreme Court against the Illinois defendant, to prevent it, in turn, from harassing her in Michigan. It will be seen at once that Illinois (like Pennsylvania in the instant case) had prior jurisdiction, which the Illinois court described as exclu-

sive; and *although it dealt with a transitory action only,* that court attached such importance to Consideration No. 1, *supra,* that it felt empowered to offer the extreme remedy of counter-injunction. Moreover, the United States Supreme Court was sufficiently satisfied with this result to deny certiorari: 358 U.S. 915, 79 S.Ct. 288. It is hard to see how this case aids appellee, *on the facts in the case at bar.*

Similarly, the *Kleinschmidt*[16] case is readily distinguishable. The parties to this marital dispute were living in Florida. The husband started a divorce action there; his wife left, went to Illinois, started a second divorce action against him there and secured from the lower court an injunction restraining her husband from continuing with his Florida proceedings. On appeal, this injunction was dissolved as improper. Clearly, the prior jurisdiction of Florida over the parties and subject matter had once again carried the day.

Doyle v. Northern Pac. R. Co., also cited by appellee, heads the list of a handful of Minnesota cases (and one Missouri case) which supports the single sentence cited by appellee from 21 C.J.S., *Courts* §554, p. 860. Several crucial points of distinction emerge:

(1) *This case was decided in 1932, when the Haddock case was still the law;*

(2) *This case and all the other cases cited were mere transitory actions,* not a single one involving a marital dispute, in which the state of marital domicile has an undisputed interest. *Williams v. North Carolina,* 317 U.S. 287, 63 S.Ct. 207 (1942);

(3) The very sentence preceding the quote from 21 C.J.S. *Courts,* § 554, *supra,* states (at p. 859):

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[16]*Kleinschmidt v. Kleinschmidt,* 343 Ill. App. 539, 99 NE(2d) 623 (1951).

"A court of one state or country cannot of course restrain the prosecution of an action in a court of another state or country by any order or decree *directed to the court or its officers; but a court which has acquired jurisdiction of the parties has power,* on proper cause shown, *to enjoin them from proceeding with an action in a court of another state or country,*[17] particularly where such parties are citizens or residents of the state, *or with respect to a controversy between the same parties of which it obtained jurisdiction prior to the foreign court.*" (Emphasis supplied)

(4) The very sentence following appellee's quote states (at p. 860):

"The courts of a state may enjoin enforcement of a palpably void foreign judgment between citizens of the state and of whom it has obtained jurisdiction."[18]

Appellant confesses a certain surprise that appellee should have the temerity to quote from *Cunningham v. Cunningham,* 25 Conn. Sup. 221, 200 A(2d) 734 (1964). Here W commenced a Connecticut action for divorce, in which H appeared and filed a counterclaim. W then went to Nevada, started a second divorce action there and then secured an ex parte injunction, which she then attempted to enforce in Connecticut. That court, after holding that since Connecticut first had jurisdiction it should be permitted to retain it without interference, and that W's motion to enforce must be denied, states (at pp. 736, 737):

"In such cases, the injunction issues to preserve the rights of the parties and enables the court to do justice. Certainly, there is no greater equity in proceeding in Nevada rather than in Connecticut in this action. *The Nevada injunction was granted ex parte*

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[17]Citing *Meyer v. Milliken,* 101 Colo. 564, 76 P(2d) 420 (1938); certiorari denied *Milliken v. Meyer,* 305 U.S. 598, 59 S.Ct. 63 (1938).

[18]Citing *Meyer v. Milliken, supra.*

> *merely upon the affidavit of the wife, and the hardship upon the husband is as great as that upon the wife . . .*"
>
> "The injunction was pendente lite given upon an affidavit *ex parte* without notice to the defendant, without hearing and without affording him a full and fair opportunity to contest the outcome."

The usefulness of the citation of 43 C.J.S., *Injunctions* § 50 to appellee's cause is likewise severely qualified by several factors: (1) the "judgment of the court of law" referred to depends for its validity on its jurisdiction over parties and subject matter; and where the judgment is an ex parte Nevada divorce decree, its jurisdiction can always be attacked collaterally—on this both case and text authorities are unanimous;[19] (2) its citation support depends on a 1930 Alabama case and a 1939 West Virginia case (neither involving marital disputes)—both before the first *Williams* case in 1942; (3) It is immediately qualified by the following language:

> "However, if the attention of the court is properly called to the fact that a party has been enjoined from proceeding, *it will usually not permit the party to disobey the injunction, and will stay the proceeding* out of respect for the court issuing the injunction." (Emphasis supplied)

The authority for this proposition is *Odom v. Langston,* 75 F.Supp. 651, 653 (D.C. Mo. 1948)—decidedly *after* the *Williams* case.

Appellee has already cited 21 C.J.S., *Courts, supra.* Section 548, pp. 855, 856 has the following to say:

> "The court of one jurisdiction cannot presume that the court of another is incompetent to do justice in cases within its jurisdiction . . . The court in which

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[19] *Sutton v. Leib, supra,* and other cited cases; 3 Freedman, *Marriage and Divorce in Pennsylvania* (2d Ed. 1957) § 792, pp. 1456, 1457.

the first action is commenced cannot be ousted of, nor will it yield, jurisdiction by reason of the subsequent commencement of another action between the same parties for the same cause of action in another state or country." (Citing, in the 1967 Supplement, *Com ex rel Meth v. Meth,* 188 Pa.Sup. 553, 149 A(2d) 488 (1959)).

Finally, as for 28 Am. Jur., *Injunctions,* § 227, appellee might do well to examine the 1967 supplement. Appellee's footnote number 28 (p. 18) deserves a footnote.[20]

Two completely unfounded legal observations appear in appellee's brief (p. 19) and will be dealt with summarily.

These concern appellee's footnote number 29 on page 19, to the effect that if Pennsylvania required proof of domicile as a jurisdictional prerequisite to the injunction, then its findings would be reviewable by the Nevada court. This is, very simply, not true. Appellee was already personally within the jurisdiction of the Pennsylvania court. Its finding as to jurisdiction either as to her person or the subject matter under these conditions may not be impeached. *Stoll v. Gottlieb, Treinies v. Sunshine Mining, Sherrer v. Sherrer,* and *Sutton v. Lieb, supra.*

Footnote number 30 on the same page is equally unfounded. If Pennsylvania determined appellee was a Pennsylvania domiciliary on June 24, 1964, even Nevada (which must concede its law requires a physically con-

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[20]While appellant cannot speak with authority on what first year law students know, he is aware that in Pennsylvania actions (like the Equity suit under consideration) Pennsylvania, not Federal, procedural rules apply. And under these rules, Equity procedure conforms to Assumpsit. Pa. Rule 1501. Under Assumpsit, Rule 1029(b) specifically states: "Averments in a pleading to which a responsive pleading is required *are admitted when not denied specifically or by necessary implication".* The only exceptions are where the pleadings are closed, or the pleading to be responded to was not endorsed with a notice to plead. 2A Anderson, *Pennsylvania Practice,* pp. 230-236. Appellant's Complaint in Equity was endorsed with a Notice to Plead **(X 2).**

tinuous six-week period to acquire the necessary local domicile to institute a divorce action) cannot telescope that requirement into 12 days: and no one can have two domiciles at the same time. (Assuming, *arguendo,* that Nevada had not already been foreclosed by res judicata).

Finally, we must correct appellee's appraisal of the *Rothman* and *Wenz* cases: in both of them, the opinions disclose, as facts, the local character of their initial residence.

What conclusions may we reach from the foregoing analysis, which has examined every authority advanced by appellee for the proposition that neither the instant, nor any, Permanent Injunction is entitled to full faith and credit?

Appellant respectfully suggests that every cited case either supports his position or is distinguishable on one or more fundamental grounds; that, further, even the statements of text authorities *on this point,* because of the blend of pre- and post-*Williams* cases relied upon to buttress those statements, present at best a confused picture, in which carefully selected dicta can scarcely stand against the formidable body of American law which sanctions, actively uses and honors the effectiveness of the injunction in extraterritorial marital disputes; and that, finally, appellee's reticence (notable on the facts) is nowhere more conspicuous than in her refusal to discuss the authorities cited by appellant.

She is silent on the Restatement sections quoted, and on Freedman; have they no bearing on this case? She offers no comment on the many Federal, Pennsylvania and other cases. She stands mute in the face of the great Supreme Court decisions of *Cole v. Cunningham,*[21] *Davis v. Davis,*[22] *Stoll v. Gottlieb* and *Sherrer v. Sherrer.*

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[21]133 U.S. 107, 10 S.Ct. 269 (1890).

[22]305 U.S. 32, 59 S.Ct. 3 (1938).

And not one word can she vouchsafe *Sutton v. Leib,* painstakingly reviewed for four solid pages in appellant's Opening Brief and mentioned therein on five other pages. Is not this the most eloquent silence of all?

V. WHAT IS THE LAW TODAY?

The most respected and forward-looking, and the more modern authorities have no hesitancy in ascribing to Injunctions the same dignity and effect accorded other judgments and decrees of similar regularity and finality.

As far back as 1919, Barbour, in a notable article in 17 Mich. L. Rev. 527, 528, discussed the undisputed recognition accorded an equitable decree for the payment of money by defendant in a foreign state, and criticized the attempted distinction between such a decree and one ordering the doing or refraining from an act (specifically, to convey land):

> "There appears to be no sensible reason for this distinction. The decree assumes substantially the same form, whether it be for the payment of money or the conveyance of land; it is *formally* but an order to the defendant to do an act, which may be the payment of $1,000 or the execution of a deed to Blackacre. Likewise, in the matter of enforcement, aside from statutory innovations, the method is the same in both types of decrees. Any argument drawn from the form of the decree or the means by which it is enforced applies equally to the decree for money . . . When a judge . . . today declares that a foreign decree ordering the conveyance of land creates no obligation but merely a duty owed by the defendant to the court, he is assuming that equity has made no progress since the time of Coke."

Goodrich, who lists six alternative bases for acquiring jurisdiction in personam over a defendant *(all* of which

are present in the case of appellee with regard to Pennsylvania), goes on to say:

> "Jurisdiction over the person of the (defendant) once acquired, continues although prior to final determination of the cause the (defendant) has left the state." Goodrich, *Conflict of Laws* (3d Ed. 1949) § 73, pp. 188, 190; and then concludes:
>
> "The doctrine of res judicata, that a cause of action once finally determined, without appeal, between the parties, on the merits, by any competent tribunal, cannot afterwards be relitigated by new proceedings either before the same or another tribunal, is fully as applicable to final decrees in equity as to judgments at law, and is by no means limited to those ordering payment of money. In short, the court of equity today stands as a tribunal equal in dignity to that of a court at law. Its orders and decrees should receive the same respect when questions regarding them arise in other states as are given, under established rules of Conflict of Laws, to the judgments of law courts." *Supra,* § 218, p. 642.

See, also, Restatement, *Conflict of Laws,* § 450(2) and § 451(2), pp. 160, 161 (1948 Supplement) *supra.*

All of these authorities, taken together with those cited in appellant's Opening Brief, disclose to us unmistakably, appellant urges, the effect Permanent Injunctions such as his will inevitably have in marital disputes, now and in the future—particularly when we consider that the author of the *Williams* opinions is still with us to dispel any misapprehensions we might entertain on the subject.

VI. THE ALTERNATIVE CONSEQUENCES OF THE CHOICE PRESENTED TO THE COURT.

The social-jurisprudential aspects of this problem deserve the final word. A finding in appellee's favor would be tantamount to advising the American bench and bar

at large that the entire corpus of long-developing principles and case law supporting the issuance of injunctions to restrain unfair litigation in foreign states is to be jettisoned in its entirety; for, if an injunction possessing all of the attributes of the instant decree is not entitled to mandatory recognition, it is impossible to conceive of one that would be.

If injunctions are not entitled to recognition elsewhere, they will be totally unenforceable unless the injunction defendant is accommodating enough to return to the injunction state and wait until legal process seizes him for contempt. This, it must be admitted, is a rather remote possibility. Such a result, then, would have a most sweeping and, it is submitted, a most disastrous effect on legal practice, without any offsetting social virtue.

On the other hand, a reversal of the order of the court below would have a highly limited effect, since such a decision would mean only that (1) where a party submits her person to one jurisdiction, which also has jurisdiction over the other party and the subject matter of a marital dispute; (2) subsequently goes to another jurisdiction and institutes a similar action against the same party (who never appears in the second state) while the first action is still in active progress; (3) the first jurisdiction then enters a Permanent Injunction against her, after reasonable notice to her and a hearing: then only will the Permanent Injunction's findings as to jurisdiction over her and the subject matter be entitled to Full Faith and Credit, and the question of jurisdiction barred by res judicata in the second state.

Limited in scope as such a finding would be, it must redound to the advantage of the deserted housewives of the nation; for, ironically, appellant may be unique in that he is probably the only man who has ever enjoined his wife from securing a divorce. It is the wives who need and secure injunctions.

Appellant suspects that the only reason this issue has not been previously decided squarely on its merits is because the usual holder of the Injunction—the wife—is without the financial resources to press such an issue to it legal conclusion.

Finally, any verbal conflict concerning the treatment and respect to be accorded the Injunction, as a legal remedy, would be resolved once and for all, to the benefit and clarification of the bench and bar as a whole.

For all these reasons, then: that logic and the rules of both law and equity indicate its right to recognition; that modern law, evolving while adjusting to the needs of modern society, recognizes its usefulness by necessary implication, and its destruction as unthinkable; that such recognition possesses the favor of our soundest thinkers in jurisprudence today: appellant respectfully submits that your Honorable Court should reverse the court below, declare the Pennsylvania Permanent Injunction valid and entitled to Full Faith and Credit everywhere, under Article IV, Section 1; and declare the ex parte Nevada divorce null and void.

Dated, April 11, 1968.

Respectfully submitted,

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Certificate of Counsel

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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